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February 6, 2006

To: Marlene H. Dortch
Office of the Secretary
Federal Communications Commission

From: Michael J. Nowick
President
Minnesota Telecom Alliance

Re: Filing of Comments in the Matter of the Commission's Notice of Proposed Rulemaking in the Implementation of Section 621 (a) (1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992
MB Docket No. 05-311

Dear Ms. Dortch:

Enclosed are the comments of the Minnesota Telecom Alliance and four copies in response to the Commission's request for comments on implementation of Section 621 (a) (1) of the Communications Act of 1984 as amended by the Communications Act of 1992 relating to changes that are necessary to increase cable competition by expediting the franchising process and eliminating outdated local laws and procedures that serve as barriers to entry.

Respectfully submitted,

Michael J. Nowick

Michael J. Nowick, President
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

I. INTRODUCTION

The following comments are submitted to the Commission on behalf of the Minnesota Telecom Alliance ("MTA") in response to the Public Notice released November 19, 2005 (the "*Public Notice*"). The MTA represents 92 telephone companies providing local exchange service to primarily rural areas in Minnesota. 37 MTA members currently offer video programming to their end users either through affiliated incumbent cable systems, or as competitive providers.

The *Public Notice* invited comments on various aspects of current video franchising practices. The MTA urges the Commission to focus its inquiry on five key concepts:

1) So called "level-playing field" provisions in state law are outdated and now act as inherent barriers to entry. Federal preemption of such outdated provisions is overdue and appropriate.

2) Focusing on "magic bullet" solutions has not been effective nor is it an efficient use of resources. As a part of the Telecommunications Act of 1996, Congress developed the Open Video System designation (OVS). Initially OVS was believed by many to hold great promise as a means to expedite entry into the video market. Unfortunately, over the years OVS.has not turned out to be the useful tool its authors once envisioned as a means to create competition.

3) The unique challenges presented by multi-county or multi-municipality joint franchise authorities acting as a cable commission must be recognized and addressed. In most circumstances, a competitive provider seeking to serve an individual community that is part of a multi-municipality cable commission may be forced to agree to onerous franchise terms and requests for capital contributions on behalf of the entire multi-municipality franchise area to match those made by the incumbent provider as the price of entry to provide competitive service to a single

municipality. As a new entrant with no customers, no revenue and demands to provide service in areas that are adjacent to but not part of the market area you are attempting to serve this quickly becomes an insurmountable barrier to entry.

4) Many of the entities seeking to provide competitive video programming delivery are telephone companies with current authority and facilities already capable of providing video in the right-of-way. To consider applying additional municipal regulation in these circumstances under the pretext of needed right-of-way management creates unnecessary new barriers to entry. .

5) The Commission should avoid potentially shortsighted regulations as a result of any rulemaking it undertakes. Do not be limited to a vision dominated by looking backward, one that perpetuates the outdated legacy local-franchising practices. A bolder, more forward-looking vision is required to advance the stated policy goals of the Commission.

The MTA will address specific questions contained within the Notice and will advance the above concepts within the context of the Notice as appropriate.

II. DISCUSSION AND COMMENTS

How many franchising authorities are there nationally?

The MTA has no knowledge of how many franchising authorities exist nationally, but can respond that there are 853 cities that are authorized by Minnesota state statute to exert local franchising authority. In addition there are 1,790 organized townships with the same authority. As of February 2004 the FCC's Media Bureau reports that out of the potential 2643 franchising authorities only 176 cities and townships in Minnesota are receiving cable service.

How many franchises are needed to reach 60 or 80 percent of cable subscribers?

In Minnesota, the MTA has conservatively estimated that 60 percent of the state's population lies within the boundaries of 166 local franchising authorities. The MTA has no way to determine where 60 percent of the state's cable subscribers currently reside or what the "take rate" would need to be to reach 60 percent of subscribers if one were to attempt to arrive at a number based on the number of households passed in each city and township. Therefore the MTA determined that using a known measurement such as population would be a more meaningful guide to use in responding to the question.

In how many of these franchise areas do new entrants provide or intend to provide competitive video services? Are cable systems generally equivalent to franchise areas?

To date, only four new entrants provide competitive video services in the 166 local franchise areas. The FCC's Media Bureau makes available a list of registered cable communities providers in each state. A review of this list for the state of Minnesota reveals that cumulatively a total of 1078 companies are listed as being "active" cable service providers in various areas throughout the state. 26 communities have two or more providers listed. However, of that 126, 72 companies are listed as "inactive." Cable systems are generally equivalent to franchise areas.

The MTA member companies feel it is relevant to point out that in this Notice; the FCC is regarding only wireline competition as "new entrants." The fact that satellite providers, who are unregulated as compared to their terrestrial counterparts, have near-ubiquitous availability in Minnesota also needs to be acknowledged.

To what extent does the regulatory process involved in obtaining franchises – particularly multiple franchises covering broad territories, such as those today served by facilities-based providers of telephone and/or broadband services – impede the realization of our policy goals?

The franchising process, as it exists today, is a relic of dated regulation which serves as a tool used by incumbent providers to preserve a monopoly market and by municipalities to extract concessions in the name of right of way management. This unnecessary and cumbersome process directly affects the administration's interrelated goals of enhanced competition in the cable marketplace and accelerated broadband deployment by putting a lid on both goals.

In many respects, the franchising process is simply an unknown quantity to many competitors. When approaching a municipality, there is no certainty except for the "level playing field" provisions of state law that hover in the background. A competitor is hampered from laying out a business plan that guarantees market entry by a date certain, with expenses identified ahead of time. This level of uncertainty transfers to the marketplace. Unfortunately, when setting out on a franchising path, there is no map and no predictability.

Are potential competitors obtaining from LFAs the authority needed to offer video programming to consumers in a timely manner?

The MTA has only anecdotal evidence of the timeframes within which franchises are being adopted. Regardless of whether or not they are being awarded in a "timely" manner, the fact remains that a new entrant has no up-front assurances that a franchise will be awarded within a timeframe that satisfies their business plan. A company that has authority to occupy the right of way, as do telecommunications providers, should be granted flexibility and ease of entry in their provision of competitive alternatives. Additionally, the traditional franchising process, which involves public notices and hearings, allows the incumbent provider to formulate their response to competition months ahead of time before the competitor can even enter the marketplace. This often entails tying customers up with long-term contracts.

How much time, on average, has elapsed between the date of application and the date of grant, and during that time period, how much time, on average, was spent in active negotiations? How many applications have been denied?

The experience of MTA members in obtaining franchises shows that there is no "average time" that elapses between the date of application and the granting of a franchise. Members have reported that it has taken approximately three months to get an "uncontested franchise" from townships but averages stretch to a year or more to receive a franchise from a municipality where there is an incumbent monopoly cable service provider. Minnesota statutes do not provide a time frame or a schedule for franchising authorities to grant a franchise. Minnesota Statute §238.081 provides for a twenty-day period between the Notice of Intent to Franchise, and the application date. Notice of a public hearing must then be given within a "reasonable" period and a hearing must also be held within a "reasonable" period. Seven days must elapse between the hearing date and the award of the franchise. Since most franchises are awarded by City Councils, which meet twice a month, this period is more likely to be at least fourteen days, if the Council agenda warrants. Other franchising authorities may meet more infrequently. And, of course, this timeframe as outlined in Minnesota Statutes is meaningless if the parties have not agreed to franchise terms. In the meantime, the incumbent monopoly cable service provider has received a

clear heads-up and is busily working to lock-in customers with long term contracts.

How has the cable marketplace changed since the passage of the 1992 Cable Act, and what effects have those changes had on the process of obtaining a competitive cable franchise?

The MTA finds it ironic that the cable marketplace has changed dramatically since 1992, and yet it has become no easier for competitive entrants to provide video services. Advanced technology makes it possible for telephone companies to provide video over copper wires and cable companies to offer telephone service through their cables. Cable companies argue that new competitors should have the same build out and service area requirements of the incumbent video provider. Cable has not had any build out or service area requirements as a condition of offering telephone service. Telephone companies should face the same build out and service area requirements in providing video as cable does today in telephony, none. This irony is even more striking when compared to the significant entry by competitive providers in telecommunications markets following the enactment of the Telecommunications Act of 1996. Following the 1996 Act, incumbent telephone companies were forced to open their markets to competition, and to make their networks available to competitors. To date, nothing comparable to create competition has happened in the cable marketplace. A double standard for competitive entry continues to exist. Now it's become even easier for cable companies and others offering high-speed Internet services to get into the voice market, but it continues to remain hard for telephone companies to enter the video market. The ease of entry today into voice is due to technology and now the adaptation of Voice over Internet Protocol (VoIP). Creating competition in cable service doesn't rely on new technological advances but on the Commission taking down roadblocks like outdated cable franchising laws that were written for another time. Without that action being taken incumbent cable service providers will continue to enjoy their monopoly markets. The ultimate irony, however, lies in the fact that many cable operators are either providing, or planning to provide, voice services in competition with MTA members. When they do, their market entry is swift and unencumbered by burdensome, outdated regulations. The cable marketplace has changed greatly since the passage of the 1992 Cable Act the process of obtaining a competitive cable franchise has not.

Should cable service requirements vary greatly from jurisdiction to jurisdiction?

The MTA is open to the suggestion that the only standards or requirements which should be required of any video programming provider are those which relate to consumer protection and delivery of public, educational and governmental (PEG) programming. All other requirements are again, outdated relics of a monopoly marketplace.

Are certain cable service requirements *no longer needed* in light of competition in the MVPD marketplace?

The MTA believes that requirements dictating service deployment are not necessary in a competitive marketplace. Further, the application of a "franchise fee" as a condition for maintenance of the public right-of-way is also obsolete.

We also ask commenters to address the impact that state laws have on the ability of new entrants to obtain competitive franchises. Some parties' state that so-called "level-playing-field" statutes, which typically impose upon new entrant's terms and conditions that are neither "more favorable" nor "less burdensome" that those to which existing franchises are subject create unreasonable regulatory barriers to entry. Others state that they create comparability among all providers. We seek comment on these issues. We also seek comment on the impact of state laws establishing a multi-step franchising process. Do such laws create unreasonable delays in the franchising process?

Minn. Statute §238.08, subdivision. 1(b) contains exactly the "level playing field" requirements stated above:

> (b) No municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational, or governmental access requirements; or (3) franchise fees. The provisions of this paragraph shall not apply when the area in which the additional franchise is being sought is not actually being served by any existing cable communications system holding a franchise for the area. Nothing in this paragraph prevents a municipality from imposing additional terms and conditions on any additional franchises.

This statute originally became law in Minnesota in 1973. A long time before the passage of the 1984 Cable Act, the 1992 Cable Act, the 1996 Telecommunications Act or the development of new technologies in the delivery of video services. The fact that only 35

Minnesota municipalities out of 853 have competitive cable service 33 years later should serve as prima facie evidence that the "level playing field" law and the barrier to entry that it created still remains effective today for incumbent cable providers in spite of technological changes and three acts of Congress.

MTA members hoped that the OVS provision, 47.U.S.C. 573 that created a new kind of cable service provider would expedite entry into providing cable service and help create competition. Federal law excluded an "open video system" from the definition of a "cable system" and exempted OVS operators from the cable franchise requirement under federal law. An OVS provider that is a local exchange carrier is authorized by federal law to provide cable service in its "telephone service area" 47.U.S.C. 573 (a) (1). An OVS providers "telephone service area" is defined as "the area within which such carrier is offering telephone exchange service."Id.573 (d). Since Minnesota Statute Chapter 238 was written long before the 1996 Telecommunications Act created OVS it was unclear to telephone companies whether this new type of cable service would be excluded from the state law defining a "cable communications system". The Minnesota Court of Appeals decided in 2003 that an open video system authorized by the 1996 Telecommunications Act was a "cable communications system" as defined in Minnesota Statutes 238.02 and subject to the "level playing field" provisions of state law and in turn cities therefore can require OVS providers to obtain a cable franchise and impose their own service area requirements. The MTA suggests that without further Commission direction and action OVS will remain an ineffective tool for creating competition in providing video service. The incorporating of OVS into the "level playing field" provisions of state law only serves to further highlight the significant barrier to entry that exists in providing competitive cable service. The MTA submits that the "level playing field" requirements are the most significant barrier to entry for its members into the video programming delivery marketplace.

We also seek comment on whether build-out requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services.

Build–out requirements for competitors in 2006 are a barrier to entry. Build-out requirements have their genesis in the "level playing field" requirements of state law which were enacted for a different time with different technology in mind. Today they remain a legacy of the outdated franchise system and "level playing field" laws. Build-out requirements are in the process of being made moot by technology. The new video providers using the Internet and partnering with content providers will not use the rights-of-way; pay the traditional franchise fee, provide PEG programming, require a franchise or have build-out requirements. New technology will continue to bypass the franchising process. Why should build-out requirements continue to be required of one class of cable competitor and not another?

We ask commenters to address whether it may be appropriate for us to preempt such state-level legislation to the extent that we find it serves as an unreasonable barrier to the grant of competitive franchises.

If the Commission is determined to create competition in the video delivery marketplace and is willing to accept the fact that a dual system of video delivery is continuing to evolve it becomes not a question of "if" but a question of "when" to preempt state legislation. The current system and laws are stacked against competition. The Commission should take action now.

III. CONCLUSION

The Commission should preempt "level playing field" state laws and build-out requirements. The level of regulation that was once considered appropriate is becoming less and less significant as technologies develop and the marketplace "leap frogs" regulation. Consumers will decide in the end what package of goods and services provides them with the best value. The more consumers who have the choice of two or more video providers, the better. The best way to make that happen is to repeal outdated laws, eliminate the double standard for telco entry and not put up any new barriers to entry. To do nothing to recognize the changes that need to take place for competition to occur is to accept the plea of the monopoly cable service providers for government aid in helping them stave of their competitors. Competition is good for consumers. The market forces are there waiting to work to benefit consumers. Minnesotans deserve more competition in video services. Only the Commission's timely rulemaking will make competition happen.